

RONALD K. ALBERTS (SBN 100017)
TAD A. DEVLIN (SBN 190355)
GORDON & REES LLP
275 Battery Street, Suite 2000
San Francisco, CA 94111
Telephone (415) 986-5900
Facsimile (415) 986-8054
Email ralberts@gordonrees.com
Email tdevlin@gordonrees.com

Attorneys for Defendants
SCENE 7, INC. LONG TERM DISABILITY PLAN and
THE PRUDENTIAL INSURANCE COMPANY OF AMERICA

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

DAWN RUTHERFORD,

Plaintiff,

v.

SCENE 7, INC. LONG TERM
DISABILITY PLAN, PRUDENTIAL
INSURANCE COMPANY OF AMERICA,

Defendants.

Case No. CV 07-6426 (WHA)

**DEFENDANTS' MEMORANDUM OF
POINTS AND AUTHORITIES IN REPLY
TO PLAINTIFF'S OPPOSITION TO
DEFENDANTS' MOTION FOR
SUMMARY JUDGMENT AND
PLAINTIFF'S REQUEST FOR *SUA*
SPONTE PARTIAL SUMMARY
JUDGMENT**

Date: July 10, 2008
Time: 8:00 a.m.
Dept.: 9

Defendants THE PRUDENTIAL INSURANCE COMPANY OF AMERICA and
SCENE 7 INC. LONG TERM DISABILITY PLAN ("Defendants") submit their Memorandum
of Points and Authorities in Reply to Plaintiff's Opposition to Defendants' Motion for Summary
Judgment, and Plaintiff's Request for *Sua Sponte* Partial Summary Judgment.

I. INTRODUCTION

"At the summary judgment stage the judge's function is not himself to weigh the
evidence and determine the truth of the matter but to determine whether there is a

1 genuine issue for trial. There is no issue for trial unless there is sufficient
2 evidence favoring the nonmoving party for a jury to return a verdict for that party.
3 If the evidence is merely colorable or is not significantly probative, summary
4 judgment may be granted.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-
5 250 (1986).

6
7 Plaintiff’s opposition seeks to prove that her current medical conditions are not excluded
8 by the “self-reported symptoms” benefit limitation in the Plan. Plaintiff does not dispute the
9 applicability of the mental illness limitation and concedes Prudential’s 24-month LTD benefits
10 limitation applies to her mental illness. However, Plaintiff fails to raise a genuine issue of
11 material fact that her conditions are anything other than *primarily* self-reported, and therefore,
12 are limited to 24 months by the very terms of the Plan.

13 Although Plaintiff concedes that the Court’s review of the Claim Administrator’s
14 decision on Plaintiff’s benefits is *de novo*, she nonetheless attempts to assert a “conflict of
15 interest” argument appropriate only for abuse of discretion review and to request further
16 discovery outside of the administrative record. Those arguments, and Plaintiff’s separate Motion
17 for Leave to Conduct Discovery, fail. Plaintiff is unable to carry her heavy burden to prove she
18 is entitled to an exception and fails to clearly establish the circumstances which warrant
19 additional discovery.

20 There is no genuine issue of material fact and Prudential’s decision to terminate
21 Plaintiff’s LTD benefits based on the 24-Month limitation is strongly supported by the evidence
22 contained in the administrative record. The medical records, including those of Plaintiff’s own
23 treating physicians, lacked objective verification of Plaintiff’s *primarily* self-reported symptoms.
24 There is also no basis for Plaintiff’s request that *sua sponte* summary judgment be granted.

25 ///

26 ///

27 ///

1 **II. THERE IS NO DISPUTE THAT PRUDENTIAL'S DECISION IS SUBJECT TO**
 2 **DE NOVO REVIEW**

3 Where the *de novo* standard is applied, the district court simply evaluates whether the
 4 benefits were correctly or incorrectly denied pursuant to the terms of the Plan. *Abatie v. Alta*
 5 *Health & Life Ins. Co.*, 458 F.3d 955, 963 (9th Cir. 2006). In other words, under *de novo*
 6 review, the court determines if the Plaintiff is entitled to benefits.

7 Whether benefits were properly denied must be determined exclusively by a review of
 8 the information within the "administrative record." *Taft v. Equitable Life Assurance Society*, 9
 9 F.3d 1469, 1472 (9th Cir. 1993). Discovery is only permitted in an ERISA case under
 10 exceptional circumstances and a district court has limited discretion to admit evidence outside of
 11 the administrative record in an ERISA case where the *de novo* standard of review is applied. A
 12 court may consider evidence outside the record only if the circumstances clearly establish that
 13 additional evidence is necessary. *Mongeluzo v. Baxter Travenol Long Term Disability Benefit*
 14 *Plan*, 46 F.3d 938, 943-44 (9th Cir. 1995).

15 The application of a *de novo* review is undisputed. Plaintiff, however, incorrectly argues
 16 she is entitled to augment the record based on a conflict of interest and seeks leave for discovery.
 17 There is no legal authority for the proposition that a conflict of interest analysis plays a role in a
 18 *de novo* review. See *Abatie, supra*, 458 F.3d at 969. As more fully set forth in Defendants'
 19 Opposition to Plaintiff's Motion for Leave to Conduct Discovery (filed concurrently herewith),
 20 Plaintiff utterly fails to satisfy the heavy burden (in a case subject to *de novo* review) to establish
 21 there are any circumstances which would require augmenting the administrative record and
 22 allowing Plaintiff to conduct discovery.

23 The administrative record contains every possible document about every stage and aspect
 24 of Plaintiff's disability claim,¹ and it conclusively and independently proves Plaintiff's LTD
 25 benefits were properly discontinued due to her mental illness and primarily self reported
 26 symptoms.

27 ¹ See Declarations of Tamika Williams and Edith Ewing (filed with Defendants' Motion for
 28 Summary Judgment).

1 **III. PRUDENTIAL APPROPRIATELY APPLIED THE 24 MONTH LIMITATION**
2 **OF BENEFITS BASED ON EITHER PLAINTIFF'S MENTAL ILLNESS OR**
3 **PLAINTIFF'S PRIMARILY SELF REPORTED SYMPTOMS**

4 **A. Plaintiff Concedes the Mental Illness LTD Benefits Limitation Applies**

5 There is no disputed issue with respect to the mental illness limitation under the Plan
6 because Plaintiff concedes she has an ongoing mental illness, which is subject to the 24-month
7 limitation, per the Plan terms.

8 **B. Plaintiff Cannot Dispute That Her Symptoms Are *Primarily Self-Reported***

9 The Plan states, in pertinent part,

10 “Disabilities due to a sickness or injury which, as determined by
11 Prudential, are *primarily* based on *self-reported symptoms* have limited
12 pay period during your lifetime. Disabilities which, as determined by
13 Prudential, are due in whole or in part to mental illness also have a
14 limited pay period during your lifetime.

15 The limited pay period for self-reported symptoms and mental illness
16 combined is 24 months during your lifetime.” (PRUR 01147.)

17 [Emphasis added.]

18 The Plan also states,

19 “*Self-reported symptoms* means the manifestations of your condition,
20 which you tell your doctor, that are not verifiable using tests, procedures
21 and clinical examinations standardly accepted in the practice of medicine.

22 Examples of self-reported symptoms include but are not limited to
23 headache, *pain, fatigue*, stiffness, soreness, ringing in ears, dizziness,
24 numbness and loss of energy.” (PRUR 00148.) [Emphasis added.]

25
26 There is no doubt that fibromyalgia is an “elusive and mysterious disease,” *Chellino v.*
27 *Kaiser Found. Health Plan, Inc.*, No. C 07-03019 CRB, 2008 U.S. Dist. LEXIS 23902 (N. D.

1 Cal. March 26, 2008) at *25, the symptoms of which are “**entirely subjective**,” *Jordan v.*
2 *Northrop Grumman*, 370 F. 3d 869, 872 (9th Cir. 2003) [emphasis added], and primarily based
3 on plaintiff’s self-reported pain complaints. *Benecke v. Barnhart*, 379 F.3d 587, 589 (9th Cir.
4 2004); *see also Walker v. American Home Shield Long Term Disability Plan*, 180 F.3d 1065 (9th
5 Cir. 1999). Accordingly, Plaintiff cannot overcome the 24 month long term benefits limitation
6 here, as evidenced in the administrative record, since her fibromyalgia was *primarily* based on
7 her *self-reported* symptoms including pain, fatigue and tenderness along her body. (See PRUR
8 00906; 00429; 00446; 00774; 00794; 00698 – 00699; 00214.)

9 Plaintiff cites no authority from this circuit – because there is none – supporting her
10 contention that fibromyalgia symptoms are not subject to self-reported symptoms limitations.
11 Plaintiff’s reliance on her treating physicians’ diagnosis is also misplaced. Not only do those
12 diagnoses rely primarily on Plaintiff’s own self-reported complaints of pain and tenderness, but
13 also, the opinion of a treating physician “gets no special weight,” and “can be rejected on the
14 basis of reliable evidence.” *See Jordan v. Northrop Grumman*, 370 F.3d 869, 879 (9th Cir.
15 2003). Plaintiff’s references to her treating doctors bolster the fact that her doctors’ diagnoses
16 were based on Plaintiff’s subjective complaints.

17 In support of summary judgment, Defendants cited reliable, independent evidence clearly
18 illustrated in the administrative record. That evidence includes an extensive three-day
19 Independent Medical Examination of Plaintiff, which revealed that Plaintiff’s symptoms were
20 magnified, her pain complaints, at best, were not verifiable (and in many instances
21 unexplainable), and her symptoms were psychiatric, not physical. (See PRUR 00185.)

22 Plaintiff also ignores, and in doing so, concedes, the arguments set forth by Defendants in
23 their moving papers and the administrative record with regard to the sleep disorder issue. Any
24 alleged sleep disorder claim is also unpersuasive because the single sleep study test on which
25 plaintiff relies has been found, by independent medical review, not to be specific to fibromyalgia
26 and can be found in normal and depressed individuals who have experienced viral illnesses.

1 (See PRUR 00214.) Contrary to Plaintiff's claims, an abnormal sleep study is not conclusive,
 2 objective verification of fibromyalgia.

3 **C. Prudential Continuously Advised Plaintiff of the Self-Reported Limitation**
 4 **and Gave Plaintiff Numerous Opportunities to Respond**

5 Plaintiff's argument about when Prudential invoked the self-reported symptoms
 6 limitation has no effect on this court's *de novo* review of Prudential's decision. Prudential did, in
 7 fact, inform Plaintiff of the self-reported symptoms limitation and the basis for its decision on
 8 numerous occasions and allowed Plaintiff had ample opportunities to respond. Plaintiff
 9 responded in her several appeals. (PRUR 01060-1063; PRUR 00367-00368; PRUR 01015.) In
 10 response to each appeal and in rendering its decision, Prudential wrote a detailed basis for its
 11 decision. Plaintiff has had extensive notice and multiple opportunities to respond to the self-
 12 reported symptoms limitation. She cannot now genuinely claim she was surprised or subject to
 13 unfair advantage exercised by Prudential.

14 **D. Degenerative Disc Disease and Mediation Effects**

15 Plaintiff attempts to argue she also had degenerative disc disease, a physical condition not
 16 subject to the LTD benefit limitation. To support this, Plaintiff again relies on the stated
 17 diagnosis with no objective finding. Even the MRI Plaintiff cites shows only mild degenerative
 18 changes, not evidence of disc bulge or herniation. (PRUR 00732.) As explained by
 19 Dr. Kimelman – whose report Plaintiff miscites – the significance of the September 2001 MRIs
 20 to which Plaintiff refers is as follows: the findings are mild and might be associated with
 21 increased pain with prolonged weight bearing. (PRUR 00182.) Moreover, the neuron-diagnostic
 22 evaluation showed no evidence of lumbar sacral radiculopathy. *Id.* Even if the diagnosis of
 23 degenerative disc disease is accepted as true, as Dr. Kimelman stated in his IME report (issued
 24 following three days of examinations and evaluations of plaintiff), “the severity of disability
 25 claimed from this condition is not supported.” There were also findings of Plaintiff's symptom
 26 magnification throughout his examinations. (PRUR 00185.) Dr. Kimelman noted Plaintiff's
 27 conditions were more psychiatric than orthopedic, neurological or musculoskeletal. *Id.*

1 Indeed, the mere existence of an impairment is insufficient proof of disability. *Matthews*
 2 *v. Shalala*, 10 F.3d 678, 680 (9th Cir. 1993). Here, there is insufficient proof of a disability from
 3 the degenerative disc disease diagnosis, and it cannot be used to circumvent the benefits
 4 limitation in this case based on Plaintiff's primarily self-reported symptoms.

5 Plaintiff's argument regarding medication effects is a red herring. Plaintiff has not made
 6 a claim of disability due to cognitive impairment. To the effect there may be, the majority of
 7 medications listed are for Plaintiff's mental conditions of anxiety and depression (*e.g.*, Xanax,
 8 Prozac), which are anti-depressants also used to treat symptoms related to fibromyalgia. In fact,
 9 over the course of three days of examinations, Plaintiff took her medications on two of the days.
 10 Dr. Kimelman, who evaluated and examined Plaintiff on all three days, indicated her "cognitive
 11 levels did not significantly change between the first examination when she stated she did not
 12 ingest medication prior to the examination, the second examination she stated that she had and
 13 the third when she stated that she took medication but felt as though she had not." (PRUR
 14 01085.)

15 **IV. PLAINTIFF CANNOT OBTAIN DOUBLE RECOVERY FOR INJUNCTIVE**
 16 **RELIEF IN AN ERISA ACTION**

17 Plaintiff argues this court could only grant Defendants partial summary judgment since
 18 the injunctive relief claim was not the focus of Defendants' motion for summary judgment.
 19 However, Plaintiff's premise is wrong. Plaintiff cannot obtain equitable relief under ERISA in
 20 any case. Since there is no genuine issue with respect to whether she was entitled to benefits,
 21 there can be no recovery under the guise of an equitable remedy.

22 The civil enforcement provisions of ERISA are governed generally by ERISA § 502, 29
 23 U.S. § 1132. Section 1132 provides, in relevant part:

24 (a) Persons empowered to bring a civil action

25 A civil action may be brought by

26 (1) A participant or beneficiary (A) for the relief provided for in
 27 subsection (c) of this section, or (B) to recover benefits due to him
 28

1 under the terms of his plan, to enforce his rights under the terms of
 2 the plan, or to clarify his rights to future benefits under the terms of
 3 the plan;

4 (2) The Secretary, or by a participant, beneficiary or fiduciary for
 5 appropriate relief under section 1109 of this title;

6 (3) A participant, beneficiary, or fiduciary (A) to enjoin any act or
 7 practice which violates any provision of this subchapter or the
 8 terms of the plan, or (B) to obtain other appropriate equitable relief
 9 (I) to redress such violations or (ii) to enforce any provisions of
 10 this subchapter or the terms of the plan.

11 Section 502(a)(1)(B) governs claims for the alleged wrongful denial of benefits. See
 12 *Varity Corp. v. Howe*, 516 U.S. 489, 512 (1996). Plaintiff's claim is a straightforward claim for
 13 benefits allegedly due under the terms of the Scene 7 employee welfare benefit plan. Plaintiff
 14 also attempts to seek relief under §502(a)(3) - where she seeks equitable relief declaring her
 15 entitled to the benefits she claims are due under the plan. § 502(a)(3) is typically referred to as a
 16 "catchall" provision, allowing equitable relief where "appropriate," meaning only where no other
 17 adequate relief is provided by ERISA. *Varity Corp.*, *supra*, 516 U.S. at 515; *Ford v. MCI*
 18 *Communications Corp. Health & Welfare Plan*, 399 F.3d 1076, 1083 (9th Cir. 2005) [court
 19 refused relief under "catchall" provision where plaintiff asserted specific claims under other
 20 ERISA provisions]; *Korotynska v. Metropolitan Life Ins. Co.*, 474 F.3d 101, 106-107 (4th Cir.
 21 2006) [citing cases holding equitable relief not appropriate to seek review of benefits denials].²

22
 23 ² The Supreme Court has limited the applicability of §502(a)(3) to beneficiaries who may not
 24 avail themselves of §502's other remedies. See *Varity Corp.*, *supra*, 516 U.S. at 489. A majority
 25 of circuit courts, including the Ninth Circuit, in interpreting *Varity* have held that a claimant
 26 whose injury creates a cause of action under § 1132(a)(1)(B) may not proceed with a claim under
 27 § 1132(a)(3). See, e.g., *Antolik v. Saks, Inc.*, 463 F.3d 796, 803 (8th Cir.2006); *Ogden v. Blue*
 28 *Bell Creameries U.S.A., Inc.*, 348 F.3d 1284, 1287-88 (11th Cir.2003); *Tolson v. Avondale*
Indus., Inc., 141 F.3d 604, 610-11 (5th Cir.1998); *Wilkins v. Baptist Healthcare Sys., Inc.*, 150
 F.3d 609, 615-16 (6th Cir.1998); *Forsyth v. Humana, Inc.*, 114 F.3d 1467, 1474-75 (9th
 Cir.1997); *Wald v. Sw. Bell Corp. Customcare Medical Plan*, 83 F.3d 1002, 1006 (8th Cir.1996).

Plaintiff's Second Cause of Action is simply an ERISA claim for benefits under the Plan. Plaintiff attempts to recover additional equitable relief, which would appropriately be sought under ERISA § 502(a)(3), but which is barred by Plaintiff's claim for benefits under ERISA § 502(a)(1)(3). Accordingly, Plaintiff's Second Cause of Action improperly attempts to re-label her ERISA claim for benefits under the Plan as a separate and additional claim for declaratory and injunctive relief. This she cannot do. Her entitlement to LTD benefits was properly denied by Prudential under the terms of the Plan. Irrespective of the benefits decision, Plaintiff is not entitled to equitable relief because double recovery is precluded under ERISA law.

V. PLAINTIFF'S REQUEST FOR *SUA SPONTE* ENTRY OF PARTIAL JUDGMENT IS BASELESS

Plaintiff seeks partial judgment based on Prudential's vocational analysis. Plaintiff cites one case, *Kassbaum v Steppenwolf Productions, Inc.*, 236 F.3d 487, 494 (9th Cir. 2000), for the general proposition that courts grant summary judgment to a non-moving party even without a cross-motion. However, the case is taken out of context and improperly applied because such an order would only be applicable – though very rarely and narrowly used³ – where both parties have agreed there is no dispute as to the facts and the case is ready for judgment. *Id.*; see also *Factora v. District Director of U. S. Immigration & Naturalization Service*, 292 F. Supp. 518, 521 (C.D. Cal. 1968). Here, Plaintiff contends, wrongly, there are factual disputes.

VI. CONCLUSION

Defendants cite overwhelming evidence proving there are no genuine issues of material fact as to whether Plaintiff's conditions are subject to the 24-month benefit limitation for

³ The propriety of granting summary judgment in favor of a party who did not so move is often a "close question." *Sohappy v. Hodel*, 911 F.2d 1312, 1320 (9th Cir. 1990) (noting that "[a] close question is presented whether summary judgment should be entered in favor of the plaintiffs although they filed no such motion" and remanding to afford the defendant an opportunity to present evidence on this issue under consideration). Moreover, if a court concludes that a non-moving party is entitled to judgment, "great care must be exercised to assure that the original movant has had an adequate opportunity to show that there is a genuine issue and that his [or her] opponent is not entitled to judgment as a matter of law." *Kassbaum v Steppenwolf Productions, Inc.*, 236 F.3d 487, 494 (9th Cir. 2000), citing *Ramsey v. Coughlin*, 94 F.3d 71, 74 (2d Cir. 1996), quoting 10A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure*, § 2720 at 34 (2d Ed. 1983).

1 conditions based on primarily self-reported symptoms and the mental illness limitation.
2 Fibromyalgia is, without question, a disease based on primarily self-reported symptoms.
3 Plaintiff was fully informed of the benefits limitations throughout the claim process and had
4 every opportunity to submit evidence showing her condition was not based on primarily self-
5 reported symptoms or mental illness. She failed to do so during the claim process and here in
6 this action. This court should grant Prudential's motion for summary judgment.

7 DATED: June 26, 2008

GORDON & REES LLP

8
9
10 By 

Ronald K. Alberts

Tad A. Devlin

Attorneys for Defendants

SCENE 7, INC., LONG TERM DISABILITY
PLAN and THE PRUDENTIAL INSURANCE
COMPANY OF AMERICA